

**United States Department of Labor
Employees' Compensation Appeals Board**

J.G., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Nipoma, CA, Employer**

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**Docket No. 11-1812
Issued: May 9, 2012**

Appearances:

Sally F. LaMacchia, Esq., for the appellant

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge

ALEC J. KOROMILAS, Judge

JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 2, 2011 appellant, through his attorney, filed a timely appeal from the July 19, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP) reducing his compensation to zero. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether OWCP properly reduced appellant's compensation benefits to zero effective July 3, 2011 based on his refusal to undergo vocational rehabilitation as directed.

On appeal, counsel contends that medical restrictions set forth by an OWCP referral physician and an attending physician and a letter from a college explaining its lack of the necessary equipment to accommodate appellant's restrictions establish that the vocational rehabilitation plan for the constructed customer service position was not suitable. She further

¹ 5 U.S.C. § 8101 *et seq.*

contends that he fully desired to cooperate with the vocational rehabilitation effort when a plan was developed within his medical restrictions.

FACTUAL HISTORY

On September 7, 2006 OWCP accepted that on May 18, 2006 appellant, then a 53-year-old rural carrier, sustained disorder of bursae and tendons in the right shoulder region as a result of being attacked by dogs on his route at work. He stopped work on October 2, 2006. OWCP authorized appellant to undergo arthroscopic right shoulder surgery to treat the accepted condition which was performed on November 30, 2006. Appellant returned to light-duty work on March 15, 2007 three hours a day, but was sent home on that date to complete a claim form for his claimed leg/tendon injury. He has not returned to work. OWCP paid him appropriate compensation for temporary total disability.

In a December 14, 2009 medical report, Dr. Margaret Elfering, an attending Board-certified orthopedic surgeon, advised that appellant had right shoulder pain postarthroscopic decompression and a right biceps tendon rupture. She opined that no medical treatment was necessary at that time. Dr. Elfering recommended a follow-up examination in six months. Appellant did not schedule this appointment.

By letter dated July 2, 2010, OWCP referred appellant, together with a statement of accepted facts and the case record, to Dr. Steven W. Pearson, a Board-certified orthopedic surgeon, for a second opinion examination to determine if appellant had any continuing residuals of his May 18, 2006 employment injuries. In reports dated July 30 and September 14, 2010, Dr. Pearson listed findings on physical examination and reviewed the medical record. He diagnosed impingement syndrome and partial tear of the rotator cuff tendon of the right shoulder. Dr. Pearson advised that appellant was status post rupture of the long head of the right biceps. He advised that appellant could return to modified work eight hours a day with restrictions. Appellant had to avoid repetitive continuous use of the right upper extremity, which included no reaching more than three hours or reaching above the shoulder at all. He could not lift more than 10 pounds up to four hours or push or pull more than 10 pounds up to six hours. Dr. Pearson advised that these restrictions were not prophylactic in nature.

On September 28, 2010 OWCP referred appellant for vocational rehabilitation services. In reports dated February 15 and March 7, 2011, Jennifer Davis, a rehabilitation counselor, provided vocational testing results and identified the positions of customer service clerk and receptionist as within his experience and educational background and medical restrictions. She conducted a labor market survey which stated that the position was reasonably available in sufficient numbers within his commuting area. Appellant took a computer operation course in the distant past, but needed updated computer skills to be competitive in the local labor market. A training program in the Office of Support Certificate Program at Laurus College consisted of computer basics word processing and Microsoft Word and would make him employable in the constructed positions. The constructed positions would allow appellant to alternately sit, stand and walk throughout the day.

In an undated letter, appellant expressed his concerns about performing the duties of the constructed positions and completing computer classes at Laurus College. In addition to his

accepted right shoulder injury, he had back pain and migraines that predated the accepted injury. If appellant took enough pain medication to control these conditions, he would become groggy or pass out and he would not be able to drive to his classes or job and concentrate on learning at school.

By letter dated April 12, 2011, OWCP advised appellant that the vocational rehabilitation plan had been approved for his return to work as either a customer service clerk or receptionist and that following completion of any necessary training or other preparation he would receive 90 days of placement assistance to help him obtain employment in the positions. It also advised him of the penalty provision if he did not cooperate with rehabilitation program.

In an April 20, 2011 letter, Renee Silvers, Director of Laurus College, advised Ms. Davis that on April 18, 2011 appellant was very difficult and reluctant to listen to instructions given to him by her assistant who helped him complete enrollment paperwork and to log onto a computer for his training class. Appellant stated that he was pressured to start the training class. Ms. Silvers had the impression that he did not want to be in the training class. The assistant had to repeatedly show appellant step-by-step the process for logging onto the required Internet page because he did not understand her instructions on how to use the computer. She moved his computer monitor closer to him as he requested. Appellant scoffed when he had to use a headset to hear the class online because he thought it was not clean. During the class he advised the instructor that he was having trouble. The instructor reviewed the lesson with appellant after class, but he did not focus on the material. Appellant seemed frustrated about having to learn about the computer. He questioned his ability to learn, stating that he had Alzheimer's disease. Appellant also complained about shoulder pain and stated that the computer keyboard was too high for him. Ms. Silvers listened to his next one-on-one session with the instructor. Appellant used a lot of foul language, his tone was negative and she could hear in his voice that he did not want to be there. Ms. Silvers advised that he would not be able to keep up with the class and needed one-on-one tutoring to be successful. She stated that student workstations and instructor desks did not have keyboard trays. Chairs at each workstation had levers to raise and lower the seat. Staff could adjust appellant's monitor, but he needed to ask for assistance.

In an April 21, 2011 letter, Ms. Silvers advised Ms. Davis that after a discussion with the executive management at Laurus College, appellant's enrollment was being withdrawn. The school did not have the special software or equipment required for his successful learning experience. Appellant's attitude and language were disruptive to the classroom. He made comments that he was forced to be in the class and that he had Alzheimer's disease. Appellant used very foul language. There was not sufficient staff to provide the continuous one-on-one tutoring he needed to be successful with computer use.

By letter dated April 28, 2011, OWCP advised appellant that he had refused to participate in a training program based on the statements of Ms. Silvers. It directed him to comply with the approved training plan within 30 days or his vocational rehabilitation effort would be terminated and his compensation reduced based on his wage-earning capacity had he completed the training program at Laurus College.

In an April 20, 2011 report, Dr. Scott Negri, a family practitioner, obtained a history that appellant experienced severe right shoulder pain since starting a three-hour computer class

mandated by his vocational rehabilitation plan. Appellant also experienced sudden pain in his left shoulder as a result of moving a computer screen in the class. Dr. Negri advised that appellant had work-related right shoulder problems which included chronic impingement syndrome and a partial rotator cuff tear. Appellant was status post rupture of the long head of the biceps tendon of the right shoulder. Dr. Negri advised that appellant's right shoulder pain was due to repetitive computer use in the class mandated by the vocational rehabilitation plan. He recommended that appellant immediately stop engaging in this activity based on Dr. Pearson's July 30, 2010 report, which restricted appellant from repetitive and continuous use of the right shoulder. Dr. Negri interpreted this restriction to include repetitive use of a computer mouse. He advised that it seemed quite clear that appellant was having a flare-up of severe pain in the right shoulder due to repetitive use in the computer class. In a May 9, 2011 report, Dr. Negri obtained a history that appellant's cervical pain radiating into his right shoulder developed while engaging in a vocational rehabilitation course. He stated that appellant worked at a computer, engaged in repetitive motion of the hand and held his head in a certain position while looking at the computer screen. Dr. Negri diagnosed anterolisthesis and acquired spondylolisthesis not otherwise specified of the cervical spine and cervical spondylosis without cord compression. He advised that appellant's significant degenerative cervical spine disease with slippage of the vertebrae caused him to become symptomatic with the relatively nondemanding activities of working at a computer. Dr. Negri, therefore, opined that appellant was precluded from participating in vocational rehabilitation. He stated that, although appellant had not filed a claim for his cervical condition, it was likely that his physically demanding work for decades contributed to his cervical spinal degeneration. Dr. Negri did not anticipate the need for surgical intervention in the near future to treat appellant's degenerative cervical spine process unless he was forced to return to an over demanding work environment, which included his computer training vocational rehabilitation course.

On May 15, 2011 Ms. Davis reported that, when she met with appellant at the college on April 18, 2011 to obtain his signature on rehabilitation plan documents, he immediately raised his voice at her, stating that he was not happy and the training caused him to experience increased discomfort. Appellant demonstrated anger and provided her with a physician's note which stated that he should stop the training immediately. He refused to sign the rehabilitation plan papers. Appellant repeated that he was unable to perform any job and that the chosen vocational goals were inappropriate for him. On April 20, 2011 Ms. Davis reported that she spoke to Ms. Silvers who agreed to help him with the training. However, Ms. Silvers stated that appellant had been very disruptive in class during his two days of attendance.

In a July 19, 2011 decision, OWCP reduced appellant's compensation benefits effective July 3, 2011 as he failed to undergo vocational rehabilitation as directed based on his capacity to earn wages as a customer service clerk.

LEGAL PRECEDENT

Section 8104(a) of FECA provides:

“[OWCP] may direct a permanently disabled individual whose disability is compensable under this subchapter to undergo vocational rehabilitation. The Secretary shall provide for furnishing the vocational rehabilitation services.”²

Section 8113(b) of FECA provides:

“If an individual without good cause fails to apply for and undergo vocational rehabilitation when so directed under section 8104 of this title, the Secretary, on review under section 8128 of this title and after finding that in the absence of the failure the wage-earning capacity of the individual would probably have substantially increased, may reduce prospectively the monetary compensation of the individual in accordance with what would have probably been his wage-earning capacity in the absence of the failure, until the individual in good faith complies with the direction of the Secretary.”³

Section 10.519 of the implementing regulations provide:

“Under 5 U.S.C. § 8104(a), [OWCP] may direct a permanently disabled employee to undergo vocational rehabilitation. To ensure that vocational rehabilitation services are available to all who might be entitled to benefit from them, an injured employee who has a loss of wage-earning capacity shall be presumed to be permanently disabled, for purposes of this section only, unless and until the employee proves that the disability is not permanent. If an employee without good cause fails or refuses to apply for, undergo, participate in or continue to participate in a vocational rehabilitation effort when so directed, [OWCP] will act as follows --

(a) Where a suitable job has been identified, [OWCP] will reduce the employee’s future monetary compensation based on the amount which would likely have been his or her wage-earning capacity had he or she undergone vocational rehabilitation. [OWCP] will determine this amount in accordance with the job identified through the vocational rehabilitation planning process, which includes meeting with [OWCP] nurse and the employer. The reduction will remain in effect until such time as the employee acts in good faith to comply with the direction of [OWCP].

(b) Where a suitable job has not been identified, because the failure or refusal occurred in the early but necessary stages of a vocational rehabilitation effort (that is, meetings with [OWCP] nurse, interviews,

² *Id.* at § 8104(a).

³ *Id.* at § 8113(b).

testing, counseling, functional capacity evaluations and work evaluations), [OWCP] cannot determine what would have been the employee's wage-earning capacity.

(c) Under the circumstances identified in paragraph (b) of this section, in the absence of evidence to the contrary, [OWCP] will assume that the vocational rehabilitation effort would have resulted in a return to work with no loss of wage-earning capacity and [OWCP] will reduce the employee's monetary compensation accordingly (that is, to zero). This reduction will remain in effect until such time as the employee acts in good faith to comply with the direction of [OWCP]."⁴

Given the variety of reasons which claimants may offer for noncooperation and the circumstances in which these reasons may be offered, it is impossible to establish a definitive list of acceptable and unacceptable reasons for lack of cooperation. In general, however, a claimant is expected to treat the vocational rehabilitation effort as seriously as employment and reasons for lack of cooperation should be considered in this light. A situation which would be considered a valid reason for absence from work (*e.g.*, an illness) may be considered good cause for failure to cooperate with vocational rehabilitation for a reasonable period of time.⁵

The United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.⁶ Once OWCP accepts a claim, it has the burden to justify termination or modification of compensation benefits.⁷

ANALYSIS

The Board finds that OWCP properly reduced appellant's monetary compensation to zero effective July 3, 2011 because he failed, without good cause, to cooperate with vocational rehabilitation efforts.

Upon receiving medical evidence that appellant was not totally disabled for all work, but was capable of working eight hours a day with restrictions, OWCP properly referred him to vocational rehabilitation services. He generally cooperated with the early and necessary stages of the vocational rehabilitation effort as he met with the rehabilitation counselor and underwent vocational testing. Appellant also enrolled in and began a computer class as part of his vocational rehabilitation. After attending a class in April 2011, he began to report that he was incapable of remaining in class due to continuing residuals of his accepted right shoulder condition and preexisting back pain and migraines. Appellant stated that the pain medication he

⁴ 20 C.F.R. § 10.519.

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.813.12.a (November 1996).

⁶ 5 U.S.C. § 8102(a).

⁷ *S.F.*, 59 ECAB 642, 646 (2008); *Betty F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Garner*, 36 ECAB 238, 241 (1984).

took to control his back and migraine conditions would render him physically incapable of driving to class or a job and concentrating in the classroom.

The Board finds, however, that the medical evidence submitted by appellant is insufficient to establish good cause for his failure to continue participation in vocational rehabilitation. Dr. Negri's April 20 and May 9, 2011 reports found that appellant developed bilateral shoulder pain and degenerative cervical conditions as a result of his "over demanding work environment" which included his vocational rehabilitation computer course. He reviewed a history that during appellant's three-hour computer class he experienced sudden pain in his left shoulder as a result of moving a computer screen. The record establishes, however, that appellant did not engage in physically demanding work, as reported by Dr. Negri. Ms. Silvers, Director of Laurus College, stated that she moved his computer monitor closer to him, as he requested, to assist him with logging onto an Internet page during the training course. She related that the school staff was also available to adjust his computer monitor. Ms. Silvers stated that appellant's enrollment in the computer course was withdrawn by the college's executive management due to his disruptive and noncooperative behavior in the classroom, use of foul language that was directed towards her and his computer training instructor and medical excuses he provided in support of his inability to participate in the computer course. Ms. Silvers' statement establishes that appellant did not engage in any physically demanding work while enrolled in the vocational rehabilitation computer course. The Board finds, therefore, that Dr. Negri's reports were not based on an accurate factual background. Dr. Negri's reports are insufficient to establish that his refusal to continue with vocational rehabilitation efforts was with good cause.

On appeal, counsel contended that, medical restrictions set forth by Dr. Pearson, an OWCP referral physician and Dr. Negri and letter from Laurus College explaining its lack of the necessary equipment to accommodate appellant's restrictions in the computer training class establish that the vocational rehabilitation plan for the constructed customer service position was not suitable. She further contended that he fully desired to cooperate with the vocational rehabilitation effort when a plan was developed within his medical restrictions. For the reasons stated above, the Board finds that the medical evidence of record and correspondence from Laurus College is insufficient to establish good cause for appellant's failure to participate in vocational rehabilitation.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that OWCP properly reduced appellant's compensation for failing to cooperate with vocational rehabilitation efforts.

ORDER

IT IS HEREBY ORDERED THAT the July 19, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 9, 2012
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board